Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

TITAN INTERNATIONAL, INC., DICO INC., and TITAN WHEEL CORPORATION OF WISCONSIN,

Petitioners,

v.

DUANE BEVER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Americans with Disabilities Act ("ADA") proscribes discrimination against a "qualified individual with a disability," defined as an individual with a disability who "with or without reasonable accommodation, can perform the essential functions of the employment position such individual holds or desires." 42 U.S.C. §§ 12112(a), 12111(8). "Discrimination" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability[.]" *Id.* § 12112(b)(5)(A).

(1) Whether the Seventh Circuit correctly held, in conflict with the established rule in the courts of appeal for the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits, that a disabled employee who does not meet the Americans with Disabilities Act's threshold requirement of being a "qualified individual with a disability," may, nevertheless, prevail on a failure to reasonably accommodate claim.

(2) Whether the ADA requires an employer to permanently eliminate essential functions of a disabled employee's position where the employer voluntarily allowed such accommodation for a period of time, or whether, as the courts of appeal for the First, Sixth, and Eleventh Circuits have held, ceasing such accommodations does not violate the ADA.

STATEMENT PURSUANT TO RULE 29.6

Petitioners DICO Inc. and Titan Wheel Corporation of Wisconsin are wholly owned subsidiaries of Titan International, Inc. (formerly known as Titan Wheel International, Inc.). Titan International, Inc. has no parent company and Court Square Capital, Limited, and Mellon Financial Corporation are the only publicly held companies which own 10% or more of the stock of Titan International, Inc.

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Petitioners Titan International, Inc., Dico Inc., and Titan Wheel Corporation Of Wisconsin ("Titan") respectfully pray that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The April 16, 2001 *per curiam* Judgment and Order of the United States Court of Appeals for the Seventh Circuit, affirming the District Court's denial of Petitioner's timely Motion for Judgment as a Matter of Law, or For New Trial, is not reported, and is reprinted in the Appendix to this Petition ("App.") at App. 1a-15a. The May 21, 2001 order of the United States Court of Appeals for the Seventh Circuit Denying Petitioner's Petition for Rehearing and Rehearing *En Banc* is not reported, and is reprinted at App. 28a. The Order of the District Court for the Eastern District of Wisconsin Granting in Part and Denying in Part Petitioner's Motion for Summary Judgment is not reported, and is reprinted at App. 18a.

STATEMENT OF JURISDICTION

The Judgment and Order of the United States Court of Appeals for the Seventh Circuit was issued April 16, 2001. App. 1a, 15a. The Seventh Circuit Court of Appeals denied Petitioner's timely Petition For Rehearing And Rehearing *En Banc* in an Order dated May 21, 2001. App. 28a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

FEDERAL STATUTORY PROVISIONS INVOLVED

The Americans with Disabilities Act is codified at 42 U.S.C. §§ 12110 *et seq.*, and pertinent provisions are reprinted at App. 30a.

STATEMENT OF THE CASE

This case involves significant questions regarding the scope of an employer's duty to continue indefinitely a light duty assignment not required by the ADA and the duty to accommodate a disabled employee who is not a "qualified individual" within the meaning of the ADA.

The factual circumstances of this case are neither unique nor complex. Titan, a wheel manufacturer, employed Mr. Bever as an assembler, a position consisting of two functions: (1) operating a Denison machine, and (2) operating tire mount/inflation equipment. Each of these functions is essential. During his employment, Mr. Bever became disabled after the amputation of his leg. Since he could no longer perform the second of his two essential job functions, Titan assigned him to perform only the Denison function for a period of time. He then was laid off and subsequently terminated. Mr. Bever brought suit against Titan alleging that Titan discriminated against him on the basis of his disability by (1) terminating him, and (2) failing to accommodate him. Bever alleged that Titan violated the ADA because it did not permit him to remain employed performing only the Denison function.

Analysis of all ADA claims by employees (as opposed to applicants) starts from the point of the position the employee holds – *i.e.*, the position for which the employee

was hired. In a failure to accommodate claim, an employee may assert that the position he holds can be restructured or that he can be reassigned to a different, vacant position. The restructuring and/or reassignment questions are part of the determination of whether the employee can be reasonably accommodated which, in turn, is part of the fundamental requirement for protection under the ADA: The employee must be a "qualified individual with a disability," defined as an individual with a disability who "with or without reasonable accommodation, can perform the essential functions of the employment position such individual holds or desires." 42 U.S.C. § 12111(8).

The Seventh Circuit in this matter concluded that the ADA permits a jury to evaluate an employee's failure to accommodate claim despite a determination by the trial court that the employee could not perform the essential functions of his position and, thus, was not a "qualified individual" under the ADA. The decision concluded that a jury could properly determine that where an employer voluntarily assigns the disabled employee to perform less than all the essential functions of his position for a period of time, such voluntarily-implemented "accommodation" must be continued. Accordingly, the Seventh Circuit decision holds that, where an employee asserts he did not understand his work assignment was temporary, he can, contrary to the ADA's terms, claim that he was a qualified individual with a disability who could perform the functions of his *assignment* rather than his "employment position." This analysis wholly disregards the requirement that an employee seeking the protection of the ADA demonstrate that he is a qualified individual with regard to the "employment position [he] holds or desires" and conflicts with the analysis of other circuits.

A. Factual Background and District Court Proceedings

Respondent Duane Bever was employed as a tire assembler with Petitioner for approximately 27 years. App. 2a. "The assembler's job involved rotating between two tasks: one was mounting and inflation, which was the more demanding task; the other was running a machine called a Denison." *Id.*

Bever suffered from cancer, which necessitated the amputation of his left leg in October 1993. App. 2a. In July 1994, a workplace assessment was conducted by Cedar Haven Rehabilitation Agency, which informed Titan that Bever could perform the Denison tasks but that it would be unsafe for him to perform the tire mount tasks. *Id.*[1] When Bever returned to work in September 1994, the plant manager assigned him temporarily to work exclusively at the Denison. *Id.* Bever suffered a heart attack in 1995. In October 1995, Bever, a diabetic, experienced an insulin reaction and was placed on medical leave pending medical assessments. *Id.* He continued on medical leave from October until he was laid off in April 1996. He was terminated in April 1997. *Id.*

Bever filed a lawsuit against Titan for discrimination under the ADA, claiming he was terminated due to his

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1. The parties used the colloquial term, "job," to describe the set of tasks which comprised the operation of the Denison machine. Merely referring to the Denison tasks as a "job", however, does not, as a matter of law, transform the tasks into a "position" under the ADA. While the statute uses the term "job" with reference to restructuring as an accommodation, the ADA refers to his "employment position" as the standard against which a qualified individual must demonstrate his abilities to perform its essential functions. 42 U.S.C. § 12111(8).

disability and that Titan failed to reasonably accommodate him. It was not disputed, and the district court found before trial, that Bever's job consisted of two essential functions:

> Bever was employed as an "assembler," a job which requires an employee to alternate between two work stations: the Denison work station and the tire mount/inflate work station.

App. 19a.

Titan moved for summary judgment on both of Bever's claims, and the district court granted the motion as to Bever's termination claim, ruling that "Bever has not shown that he is qualified to perform the assembler job he was hired to do." App. 25a. The district court ruled that "Bever has failed to carry his burden on summary judgment to establish that his termination as an assembler was in violation of the ADA." *Id.* The district court, however, permitted Mr. Bever to proceed to trial on his failure to accommodate claim. App. 3a, 18a. The jury found Titan liable on this claim, and the district court entered judgment effective October 8, 1999. *Id.*; App. 16a. Titan timely moved for Judgment as a Matter of Law and For a New Trial. App. 2a. Titan appealed to the Seventh Circuit the district court's denial of the Motions for Judgment as a Matter of Law and for New Trial. *Id.*

B. Seventh Circuit Decision

The Seventh Circuit panel affirmed. The panel's analysis began with a recitation of the facts that Bever's assembler position consisted of two essential functions: "The assembler's job involved rotating between two tasks: one was mounting and inflation, which was the more demanding task; the other was running a machine called a Denison." App. 2a.

The panel set forth the issue before it as follows:

> . . . Bever counters Titan's claim that the Denison job was temporary by pointing out that he had been allowed to do the Denison job for a year and a half without the company showing that the situation posed an undue hardship. He contends that he should have been allowed to continue to do the job. *The issue then becomes whether assignment to the Denison work station was a reasonable accommodation and whether termination from that position was in violation of the ADA.*

App. 7a. The Seventh Circuit panel decision referenced only a portion of Bever's trial testimony. However, the context of this testimony demonstrates that he concedes he could not perform the tire mount/inflation portion of the assembler position and that he could perform no other existing position at Titan:

> In response to a question about whether he was told that at some time "you are going to have to be able to do the tire mount and the tire inflation job to keep your job here," he said "No." Then he was asked what he would have done had he been told that. His response was, "I probably would say I have to look for a different job then. I can't stay here no more."

App. 9a.

Titan contended that Bever could not prevail on a failure to accommodate claim where it had already been determined

by the district court that he was not a "qualified individual with a disability" as to his assembler position. The panel concluded that the position held by Mr. Bever was assembler. Nevertheless, contrary to the express terms of the ADA and well-accepted precedent in other federal circuits, the panel reviewed the accommodation issues by substituting the "Denison job" as the position "held" for purposes of the reasonable accommodation analysis. The panel concluded that "we think that whether this assignment was temporary or permanent was unclear to him, and he can claim he was a qualified individual for the job he held [Denison]." App. 6a. The result of the panel's decision is that an employee asserting disability discrimination who alleges both termination and failure to accommodate arising out of a single termination can assert that he holds one position for purposes of the termination claim, yet a different position for purposes of his accommodation claim. For the reasons set forth below, such a rule eliminates the requirement that an employee demonstrate that he is a "qualified individual with a disability" in order to proceed with his failure to accommodate claim under the ADA.

REASONS FOR GRANTING THE WRIT

The Seventh Circuit decision raises significant questions of federal employment law regarding the scope of an employer's duty to accommodate under the ADA. The guidance of this Court is required in order to ensure uniform application of the ADA across the circuits.

Titan acknowledges that the decision below is an unpublished order that the Seventh Circuit's rules deem to have limited precedential effect. Nevertheless, for the reasons set forth below, as an employer with facilities and employees

in several federal circuits, Titan is bound by the Seventh Circuit's application of the ADA within the Seventh Circuit, yet equally bound to conduct itself according to contrary interpretation of the ADA by other circuits. As a result, both Titan and its employees are subject to entirely different standards for resolution of accommodation issues, depending upon the location of the facility in which the employee works.[2]

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2. Titan acknowledges that Supreme Court Rule 10 does not include intra-circuit conflicts as indicative of the character of petitions granted. However, while Titan is bound by the Seventh Circuit ADA decision in this matter, *it is also* bound by published opinion precedent in other ADA cases within the Seventh Circuit. (Seventh Circuit Rule 53(b)(2)). Significantly, this Seventh Circuit decision not only conflicts with other circuit opinions, but also with published opinions in the Seventh Circuit. The arbitrary application of differing interpretations of the plain language of the ADA based on geographic location, or whether a decision is "published," conflicts with the fundamental doctrine of precedent, which is meant to create order and *predictability*: "The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature." Justice Joseph Story, *Commentaries on the Constitution of the United States*, §§ 377-78 (1833). Significantly, the Circuit Court opinions that contradict the decision in this matter all rely in part on published Seventh Circuit opinions to support their conclusions. This Court has stated that "the principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals." *Braxton v. United States*, 500 U.S. 344, 347 (1991). Fundamental fairness thus requires that the Seventh Circuit decision's status as "unpublished" not mitigate against review by this Court, as there is no less a conflict than if the Seventh Circuit decision at issue here were published.

I. The Decision Of The Seventh Circuit Cannot Be Reconciled With The Plain Language Of The ADA, the Decisions of this Court, and Other Federal Circuits, as it Permits a Factfinder to Determine an Employer is Liable For Failing To Accommodate an Employee Who, As Matter Of Law, is Not A "Qualified Individual with a Disability"

The Americans with Disabilities Act prohibits employers from discriminating against a "qualified individual with a disability" with regard to the terms and conditions of that individual's employment. 42 U.S.C. § 12112(a). A "qualified individual with a disability" is an individual with a disability who "with or without reasonable accommodation, can perform the essential functions of the employment position such individual holds or desires." *Id.* § 12111(8). "Discrimination" under the ADA includes "discharge of employees" because of the disability and "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such [employer] can demonstrate that the accommodation would pose an undue hardship on the operation of the business of such [employer]." *Id.* § 12112(a) and § 12112(b)(5)(A). "Reasonable accommodation" may include "job restructuring" or "reassignment to a vacant position." *Id.* § 12111(9)(B).

The express language of the ADA, as well as decisions of this Court are clear that in order to invoke the protection of the ADA to protest disability discrimination, an employee must demonstrate that he is a " 'qualified individual with a disability' – that is, a person 'who, with or without reasonable accommodation, can perform the essential functions' of [his] job." *Cleveland Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806,

119 S. Ct. 1597, 1603 (1999) (quoting 42 U.S.C. § 12111(8)); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 n.17, 107 S. Ct. 1123, 1131 n.17 (1987) ("An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap.") (Rehabilitation Act case) (quoting *Southeastern Community College v. Davis*, 442 U.S. 397, 406, 99 S. Ct. 2361, 2367, 60 L. Ed. 2d 980 (1979)).

"The law in this area is crystal clear: an otherwise qualified person is one who is able to meet all of the [job's] requirements in spite of his handicap." *Burch v. City of Nacogdoches*, 174 F.3d 615, 619 (5th Cir. 1999) (internal quotations omitted).

> To establish a *prima facie* case under the ADA, a plaintiff must show that she is a disabled person within the meaning of the ADA, that she is qualified to perform the essential functions of the job (either with or without reasonable accommodation), and that she has suffered an adverse employment action under circumstances from which an inference of unlawful discrimination arises.

Price v. S-B Power Tool, 75 F.3d 362, 365 (8th Cir. 1996), *cert. denied*, 519 U.S. 910, 117 S. Ct. 274, 136 L. Ed. 2d 197 (1996).

Accordingly, the requirement that an employee demonstrate that he is a "qualified individual" is a fundamental threshold prerequisite for protection under the ADA. Contrary to the express terms of the ADA, however, the decision below entirely dispenses with the requirement that an employee prove that he is a "qualified individual with a disability" for purposes of a discrimination claim based on an alleged failure to accommodate.

A necessary part of the analysis of whether an employee is a "qualified individual with a disability" for accommodation claims is the determination whether a proposed accommodation to perform the essential functions of an employment position is "reasonable." "Reasonable accommodation" may include job "job restructuring" or "reassignment to a vacant position." 42 U.S.C § 12111(9)(B).

With regard to accommodation by reassignment, numerous circuits have interpreted a "qualified individual with a disability" as including individuals "who can perform an appropriate reassignment job within the company, with or without accommodation, even though they cannot perform their existing job no matter how much accommodation is extended[.]" *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1162 (10th Cir. 1999) (collecting cases from First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth and D.C. Circuits.) Thus, reasonable accommodation may take the form of a reassignment from the position the employee holds to another position that the employee "desires." 42 U.S.C. § 12111(9)(B). However, the express terms of the ADA and well-accepted precedent dictate that "appropriate reassignment job" necessarily means an *existing, vacant position* to which the employee could be reassigned. "It is not reasonable to require an employer to create a new job for the purpose of reassigning an employee to that job." *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1174 (10th Cir. 1999) (*en banc*) (collecting cases). The ADA expressly states that the scope of an employer's duty to reassign a disabled employee is limited to an existing *position*: "reasonable accommodation may include . . . reassignment to a vacant position." 42 U.S.C. § 12111(9). Therefore, for "reassignment" to be a reasonable accommodation, it cannot be to merely selected portions of an employment position.

When an employee seeks to perform merely portions of his employment position, courts analyze the requested accommodation as a "job restructuring." In other words, the employee has requested the employer to eliminate certain functions of employee's position. Restructuring is an appropriate way to reasonably accommodate a disabled employee provided the restructuring does not involve the removal of essential functions. "While it is true that the ADA may require an employer to restructure a particular job by altering or eliminating some of its marginal functions, employers are not required to transform the position into another one by eliminating functions that are essential to the nature of the job as it exists." *Lucas v. W.W. Grainger, Inc.*, __ F.3d __ (11th Cir. 2001), 2001 WL 803481, *8; *Laurin v. Providence Hospital*, 150 F.3d 52, 56 (1st Cir. 1998) ("It is well-settled that an employer need not accommodate a disability by foregoing an 'essential function' of the employment position."); *Gilbert v. Frank*, 949 F.2d 637, 642 (2d Cir. 1991) ("reasonable accommodation" does not mean elimination of any of the job's essential functions) (Rehabilitation Act); *Donahue v. Consolidated Rail Corporation*, 224 F.3d 226, 232 (3d Cir. 2000) (employers not required to modify essential functions of job in order to accommodate employee) (Rehabilitation Act); *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683, 687 (4th Cir. 1997) ("ADA simply does not require an employer to hire an additional person to perform an essential function of a disabled employee's position."); *Burch v. City of Nacogdoches*, 174 F.3d 615, 621 (5th Cir. 1999) (ADA does not require employer to relieve employee of any essential functions of his job, modify those duties, reassign existing employees to perform those jobs, or hire new employees to do so); *Bratten v. SSI Services, Inc.*, 185 F.3d 625, 632 (6th Cir. 1999) (job restructuring within meaning of ADA only pertains to the

restructuring of non-essential duties or marginal functions); *Basith v. Cook County*, 241 F.3d 919, 929-30 (7th Cir. 2001) (rejecting plaintiff's suggestion to assign medication delivery, an essential function of plaintiff's job, to other employees because it would "result in a restructuring of both his job and the jobs of other employees. This is not required by the ADA."); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112-13 (8th Cir. 1995) (employer need not reallocate essential functions of job); *Frazier v. Simmons*, 254 F.3d 1247, 1261 (10th Cir. 2001) ("Although job restructuring is a possible accommodation under the [ADA], an accommodation that eliminates the essential function of the job is not reasonable.") (internal quotations omitted).

Accordingly, for both restructuring and reassignment accommodation claims, the relevant functions for purposes of analysis are those of the position for which the employee was hired, as opposed to the position to which he is assigned. *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1175-76 (10th Cir. 1999) (affirming district court's analysis of termination claim utilizing essential functions of position for which plaintiff was hired, not the position to which she was assigned at time of termination); *Miller v. Illinois Department of Corrections*, 107 F.3d 483, 485 (7th Cir. 1997) (essential functions of prison guard position included all functions required of prison guards even where plaintiff had been allowed to rotate only between certain assignments). Moreover, it is well accepted that ". . . when an employer and employee have made arrangements to account for the employee's disability – a court must evaluate the essential functions of the job without considering the effect of the special arrangements." *Phelps v. Optima Health, Inc.*, 251 F.3d 21, 25-26 (1st Cir. 2001) (collecting cases from Seventh, Tenth and Eleventh Circuits).

Despite the clear language of the ADA and the contrary interpretation by other circuits, the reasoning of the decision below permits a disabled employee who alleges disability discrimination to claim that he held one position for purposes of his discriminatory discharge claim, but a different position for purposes of a failure to accommodate claim, even though the two claims arise from the same set of facts and are as a result of a single termination.

Where an employee cannot demonstrate that his requested job restructuring or reassignment is reasonable, he cannot show that he is a "qualified individual with a disability" who can perform his employment position with reasonable accommodation. Since "qualified individual" is a threshold requirement for ADA coverage, an employee who cannot demonstrate this element cannot prevail on either a discharge or reasonable accommodation claim. Accordingly, the ADA cannot be interpreted to permit a jury trial on such an accommodation claim where the ADA would allow termination of the employee.

This conclusion is plain from the express language of the ADA. The statute proscribes discrimination against only "qualified individual[s] with a disability[.]" 42 U.S.C. § 12112(a). Unlawful discrimination under the ADA includes both discriminatory discharge and the failure to provide reasonable accommodation. 42 U.S.C. § 12112(a), (b)(5)(A). In order to prevail on either claim, the plaintiff must meet the definition of a "qualified individual with a disability."

Virtually every circuit that has addressed the issue of who is a qualified individual with a disability in the context of restructuring of job functions or reassignment has held that where restructuring or reassignment implicates

essential functions of a position, it is not a "reasonable accommodation." The Eighth Circuit has expressly held that where the employee's requested accommodations are not reasonable, the employee "cannot show that [ ]he is a qualified individual under the ADA and therefore has not established a *prima facie* case of disability discrimination." *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 788 (8th Cir. 1998); *Sieburns v. Wal-Mart Stores*, 125 F.3d 1019, 1022 (7th Cir. 1997) (where plaintiff cannot perform essential functions of job, he is not a "qualified individual," and cannot prevail on either a disparate treatment or reasonable accommodation claim). The Seventh Circuit decision below stands in sharp contrast to the plain language of the ADA and this overwhelming precedent.

II. The Seventh Circuit's Decision Conflicts With Recent Decisions Of The First, Sixth, And Eleventh Circuits That an Employer's Decision to Cease Accommodations that Exceed the Requirements of the ADA, Even Where Voluntarily Implemented For A Period Of Time, Does Not Violate the ADA

"Courts have continuously found that employers are not required to assign existing employees or hire new employees to perform certain functions or duties of a disabled employee's job which the employee cannot perform by virtue of his disability." *Bratten v. SSI Services, Inc.*, 185 F.3d 625, 632-33 (6th Cir. 1999) (collecting cases from Second, Seventh, Eighth and Eleventh Circuits). Where an employer voluntarily chooses to reassign essential functions, nothing in the ADA requires the employer to continue to do so. Significantly, the federal circuits that have considered this issue have uniformly held that a decision to cease making accommodations that exceed the requirements of the ADA does not violate the ADA.

Contrary to the other circuits that have reviewed this issue, the rule applied by the panel below permits a failure to accommodate plaintiff to claim that the employment position he "holds" is the same as the position he "desires" under the ADA.

In *Phelps v. Optima Health, Inc.*, 251 F.3d 21 (1st Cir. 2001), the employer permitted the plaintiff, a clinical nurse, to share tasks that she could not physically perform with other nurses who were willing to perform some of the more strenuous essential functions of Phelps' job for her. A new supervisor concluded that Phelps' physical restrictions precluded her from performing the essential functions of her clinical nurse position and terminated her.

Phelps argued that she was not a clinical nurse at the time of her termination, but rather, was a "medical nurse," a position she claimed was a special assignment created for her which avoided performance of the strenuous functions of her position. The court rejected this argument, concluding that, although she had been permitted to continue to work with the assistance of other nurses, her job at the time of her termination was clinical nurse. The court applied the long-accepted rule that an employer need not exempt an employee from performing essential functions, nor need it reallocate essential functions to other employees. "The fact that [the employer] previously allowed Phelps to engage in a job-sharing arrangement does not obligate them to continue providing such an accommodation." *Phelps*, 251 F.3d at 26. The First Circuit, therefore, affirmed the district court's grant of summary judgment to the employer on the grounds that the employee was not a "qualified individual with a disability" because she could not perform the essential functions of her job "with or without reasonable accommodation." *Id.* at 28.

In *Bratten v. SSI Services, Inc.*, 185 F.3d 625 (6th Cir. 1999), an auto mechanic could not perform certain of the more physical essential functions of his position. Bratten requested that a co-worker assist him when he faced a task that his physical restrictions would not permit. Bratten went on medical leave, but sought to retain his mechanic position. He argued that his employer could have continued to accommodate him by restructuring his position and letting the other employees help him perform the more physical tasks of his job. The Sixth Circuit held that the employer was not obligated to provide such an accommodation because employers are not required to assign existing employees or hire new employees to perform essential functions of the disabled employee's job. *Bratten*, 185 F.3d 632. The Sixth Circuit in *Bratten*, like in *Phelps*, affirmed the district court's determination that employee was not an "otherwise qualified individual with a disability" because he could not perform the essential functions of an auto mechanic with or without reasonable accommodation. *Id.*

In *Holbrook v. City of Alpharetta*, 112 F.3d 1522 (11th Cir. 1997), the plaintiff, a police detective, suffered from visual problems sustained in an automobile accident which prevented him from driving and collecting some types of evidence at a crime scene, undisputed essential functions of his position. When he returned from medical leave, the City of Alpharetta assigned Holbrook to work that could primarily be handled in the office, permitted another officer to drive Holbrook to locations outside the office when necessary, and shuffled case assignments. *Id.* at 1527. Holbrook claimed that the City violated the ADA by failing to continue the accommodations that it had provided in the past. However, the Eleventh Circuit held that because the accommodations involved essential functions of Holbrook's

position, they were not legally required and, thus, need not be continued. In affirming the grant of summary judgment for the employer on Holbrook's failure to accommodate claim, the court stated: "We cannot say that the City's decision to cease making those accommodation that pertained to the essential functions of Holbrook's job was violative of the ADA." *Id.* at 1528.

Application of the rationale of the Seventh Circuit panel below would have required the courts in *Phelps*, *Bratten*, and *Holbrook* to analyze the failure to accommodate claim from the perspective of the modified set of tasks, or "assignment," that each employer permitted the plaintiffs to perform. This would essentially turn the assignment into a "new position" without one or more of the employee's essential functions. Research has revealed no authority that requires an employer to do that. Instead, the circuits that have addressed this issue have expressly held that accommodations involving essential functions are not reasonable and are thus not required by the ADA. In any event, it is not logical to analyze an employee's failure to accommodate claim from the perspective of the "new assignment." The question whether an employee is a qualified individual from that perspective is self-fulfilling because an employer has nothing more to accommodate – the modified task(s) will always be an "assignment" for which the disabled employee will be qualified.

The cases in the First, Sixth and Eleventh Circuits are merely the logical extension of the well settled principle that "an employer need not accommodate a disability by foregoing an 'essential function' of the employment position." *Laurin v. Providence Hospital*, 150 F.3d 52, 56 (1st Cir. 1998). The Court should grant review to clarify this fundamental issue regarding accommodation of disabled employees under the ADA.

III. The Conflict Among the Circuits Involves a Significant and Recurring Issue of National Importance Which Threatens Differing Treatment Of Disabled Employees Based Upon The Circuit In Which They Are Employed

Significantly, the Seventh Circuit decision virtually precludes employer creativity in attempting to preserve the employment of individuals disabled during the course of employment, an objective the ADA was meant to encourage. "[T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency[.]" 42 U.S.C. § 12101(a)(8).

If the employer experiments by grouping tasks into "assignments" that it is not legally obligated to create, the employer risks a determination that the assignment is a "reasonable accommodation," or at least that it is a question of fact, solely because the employer tried it and notwithstanding any essential function designation. Such an analysis is tantamount to conceding that the employee is a "qualified individual with a disability" under the ADA. Thus, instead of applying the ADA's straightforward requirement that the *employee demonstrate* that he is a "qualified individual with a disability," by showing that he can perform his job with reasonable accommodation, the decision below permits a court to dispense with the requirement that a plaintiff demonstrate that the accommodations necessary to permit him to perform the essential functions of his position are *reasonable.* The First Circuit has held that "we agree with the Seventh Circuit that evidence that accommodations were made so that an employee could avoid a particular task 'merely shows that the job could be restructured, not

that [the function] was non-essential.' " *Phelps v. Optima Health, Inc.*, 251 F.3d 21, 26 (1st Cir. 2001) (alteration in original) (quoting *Basith v. Cook County*, 241 F.3d 919, 930 (7th Cir. 2001)). "To find otherwise, would unacceptably punish employers from doing more than the ADA requires, and might discourage such an undertaking on the part of employers." *Id.* (collecting cases from First, Seventh and Eleventh Circuits).

Not only does the holding below result in application of the ADA to persons who are not "qualified individuals" and discourage Titan and others employers from undertaking to maintain the employment of disabled individuals, but it also has a direct impact on non-disabled employees who are required to assume additional duties and restructuring of their duties in order to accommodate a disabled employee. The ADA should not be interpreted to require an employer to continue voluntary actions that involve restructuring the essential functions of other employees' positions. Such an interpretation would require employers to discriminate against non-disabled employees in a misguided effort to prevent discrimination against disabled employees. This is inherently recognized by the accepted principle that the ADA "is not a mandatory preference act," and does not require displacing the rights of other employees under a legitimate, nondiscriminatory, policy of the employer. *See EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1028 (7th Cir. 2000). Therefore, the decision below raises significant questions regarding the application of all covered employers' non-discriminatory employment policies.

The conflicts demonstrated in this petition are of great national importance, as the plain language of the ADA cannot be interpreted to require employers to implement

accommodations for employees who are "disabled" but who do not demonstrate that they are "qualified individuals." Moreover, accommodation efforts should not differ depending upon whether the employee's workplace is located within the Seventh Circuit or in another circuit. This Court should grant review of the decision below to ensure that the geographic location of an employee is of no legal significance in assessing the scope of the employer's reasonable accommodation duties under the ADA and to clarify that an employer need not implement accommodations that are not required by the ADA.

CONCLUSION

For the foregoing reasons, the Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

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DATED: August 17, 2001

APPENDIX

APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED APRIL 16, 2001

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Argued November 16, 2000
Decided April 16, 2001

Before

Hon. Richard D. Cudahy, *Circuit Judge*

Hon. John L. Coffey, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

No. 00-1594

DUANE BEVER,

Plaintiff-Appellee,

v.

TITAN WHEEL INTERNATIONAL, INC., DICO INC., and TITAN WHEEL CORPORATION OF WISCONSIN,

Defendants-Appellants.

Appendix A

Appeal from the United States District Court
for the Eastern District of Wisconsin.

No. 97-C-0511

John W. Reynolds, Judge.

ORDER

A jury sided with Duane Bever on his claim that Titan Wheel International, Inc. violated his rights under the Americans with Disabilities Act, 42 U.S.C. § 12111 *et seq.* Titan, contending that its motion for judgment as a matter of law or for a new trial should have been granted, appeals.

Bever worked for Titan as an assembler for over 27 years. The assembler's job involved rotating between two tasks: one was mounting and inflation, which was the more demanding task; the other was running a machine called a Denison.[1] The Denison job involves preparing wheel rims for mounting, a less rigorous job than mounting and inflation.

Bever suffered from cancer and, as a result, in October 1993 his left leg was amputated. He was later fitted with a prosthesis. He has been receiving social security disability payments since the amputation in 1993.

In July 1994 a workplace assessment was conducted by Lori Kessenich from Cedar Haven Rehabilitation Agency; she informed Titan that Bever could perform the Denison

1. Apparently named for the manufacturer.

job but that it would be unsafe for him to operate the tire mount machine. When Bever returned to work in September 1994, plant manager Rick Kohl assigned Bever to work exclusively at the Denison.

Then on October 12, 1995, Bever, who was also diabetic, experienced an insulin reaction in the company parking lot after work. The next day Titan placed him on unpaid leave pending medical assessments by various health professionals. On October 19 Dr. David Drury ordered that a physical capacity assessment be conducted on Bever. The result was a finding that Bever "can perform his required job duties as reported without any difficulties throughout full shift. . . ." The job duties reported involved work on the Denison machine. A similar conclusion was reached during a job analysis at the plant in 1995. Also in October 1995, Bever had a heart attack, resulting in by-pass surgery. He was on medical leave from October 1995 until he was laid off in April 1996 and terminated in April 1997.

Bever sued, and on March 27, 1998, Titan's motion for summary judgment was granted in part; however, Bever was allowed to proceed to trial on his claim that Titan failed to make a reasonable accommodation for him as required by the ADA. This is the claim Bever prevailed on at trial.

Not surprisingly, the parties do not see the case in quite the same light. Titan contends that in 1994, when Bever returned to work, he was given the job of operating the Denison as a temporary assignment — that it was never intended to be a permanent assignment. When it became clear that Bever could not perform both duties required of an

assembler, the company says it was under no duty to create a new job for him. To allow Bever to continue as a Denison operator would be, in effect, doing just that. That the company allowed him to operate the Denison for a time was merely the company's going "far beyond what is required of it under the ADA." In denying its motion for judgment as a matter of law, the district court, in Titan's words, "penalizes Titan for its generosity."

Bever thinks the contention that the Denison job was a temporary placement is a fabrication designed for this litigation. He says he was never told it was temporary — or for that matter that it was permanent. What happened in his view is that after his insulin reaction the company became concerned about his posing a safety threat. However, when the medical experts weighed in, saying that he was not a safety threat in the Denison job, the company had to come up with a new explanation for terminating him. The company came up with the argument that the Denison job was temporary — a contention Bever finds incredible because it had to be obvious to the company all along that the tire-mount function would be impossible for a person whose leg had been amputated, and clearly he was not going to "recover." Under that circumstance, what would be the point of a "temporary" job?

We review the denial of a motion for judgment as a matter of law *de novo*. *Mathus v. Board of Trustees of S. Ill. Univ.*, 207 F.3d 938 (7th Cir. 2000). In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097 (2000), the Court resolved a conflict in the circuits over the proper standard for reviewing a Rule 50 motion.

> It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record.
>
> In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe.

At 2110 (citations omitted). With this in mind, we will examine the evidence in the record. Before we do that, however, a few general points need to be mentioned.

At the outset, we express our agreement with Titan that no case — this one or any other — should result in discouraging employers from taking steps to help their disabled employees. Titan thinks that could be the result here because it went out of its way to let Bever have the Denison job for a while and now is being penalized for its generosity by having the job characterized as one which attained permanence — the "no good deed goes unpunished" defense. We do not think that is what happened. The facts are much fuzzier than that. As we will see, there is evidence that the Denison job had never before been considered a permanent position, but there is also no evidence of any meaningful

discussion with Bever as to whether the job was his to keep or only his temporarily. There is also the question as to what possible improvement Bever could make which would enable him to do the tire mount job, which required pressure on a foot pedal, which he was and would remain unable to apply. A company can ensure it will not be punished, as Titan claims it was here, by engaging in frank discussions with the employee about the nature of what is being offered to him, as required by the ADA. *See Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560 (7th Cir. 1996).

Titan also argues that the district court decisions are contradictory, leading to the conclusion that Bever was not a "qualified individual" under the ADA and therefore not protected. The argument is that Bever is not a "qualified individual" because the district court ruled that he could not perform the job as an assembler with or without an accommodation. Therefore, termination from a job as an assembler was not in violation of the Act. Titan contends that the court then inexplicably allowed Bever to proceed under his reasonable accommodation claim. The argument, while having some logical appeal, does not carry the day. Because Bever was allowed to work exclusively at the Denison work station for nearly a year and a half and there were no meaningful discussions between Titan and Bever about the nature of the accommodation, we think that whether this assignment was temporary or permanent was unclear to him, and he can claim he was a qualified individual for the job he held.

Related to the argument that the district court decisions were contradictory is the claim that Bever made judicial

admissions that he was waiving his accommodation claim. Bever's attorney made a statement during closing arguments that "[w]e are never arguing that he was allowed to have a permanent accommodation in the Denison machine." The statement may seem somewhat inexplicable given the fact that the duration of the accommodation is, in fact, an issue in the case. But it is Titan's issue, not Bever's. Bever's counsel was concentrating on another issue. The thrust of his closing argument was that Titan's claim that the Denison job was temporary was not the real reason for the termination, but was a false reason given when it became clear that the real reason would not withstand scrutiny. The real reason was that "they simply don't want this man in their plant because they are afraid of him"; that is, they are afraid he is a safety concern. The claim is that a concern with safety was irrational and shows prejudice: "They are afraid of Duane Bever because he has a false leg." The safety concern is considered pretextual because, in Bever's view, the medical evidence — which we shall discuss later — refutes the safety concern. Because Bever contends that Titan's explanation of its reason for Bever's termination — that is, that the job was temporary — is false and that the real reason is that the company was afraid of him, the statement counsel made during closing arguments is not fatal to his claim. Bever counters Titan's claim that the Denison job was temporary by pointing out that he had been allowed to do the Denison job for a year and a half without the company showing that the situation posed an undue hardship. He contends that he should have been allowed to continue to do the job. The issue then becomes whether assignment to the Denison work station was a reasonable accommodation and whether termination from that position was in violation of the ADA.

In Titan's view, the issue is simply whether the job was temporary or permanent.

Under the ADA, once an employee informs his employer of his legitimate disability, the employer's obligation to provide a reasonable accommodation is triggered. *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130 (7th Cir. 1996). At that point, the employer must engage with the employee in an "interactive process" to determine an appropriate accommodation. *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560 (7th Cir. 1996). The requirement is that the employer must discuss with the employee accommodations which might enable the employee to continue working. *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685 (7th Cir. 1998). *Hendricks-Robinson* involved the precise issue before us: whether light-duty jobs were temporary. We said that if the jobs were truly temporary, the company was not required "to convert them into permanent ones for the permanently restricted employees." However, the company had not made it clear whether the jobs were temporary or permanent: "[I]t remains a question of fact whether the jobs were temporary." At 697. In that case, as well, there was a question of fact "whether the injured employees knew that the jobs in which they initially were placed were truly temporary or whether they could consider the jobs a reasonable accommodation for their impairments." At 698.

So at long last we arrive at the issue before us, which is whether a reasonable jury could have made the findings it did. One piece of evidence, which we have already mentioned would support a finding that the job was not considered

temporary, was that Bever worked at the job for a year and a half. Two separate work place assessments started with the presumption that the job they were evaluating Bever for was the Denison job. In addition, a number of internal company memos allow the inference that the Denison job became Bever's work assignment. Rochelle Didier, Titan's human resources manager, said that in October 1995, Bever was allowed to return to work full-time "regular duty with no restrictions." The return to work had necessarily to be to the Denison. She also said that his top two duties would be bearing insertion and wheel paint broach. These are the tasks which comprise the Denison job. Another company official informed the Equal Employment Opportunity Commission that the company "put Mr. Bever in the denison position . . . which is the lightest and easiest job we have in the entire plant." She continued to explain why Bever was terminated, "But, steadiness and balance is essential in even this job." "This job" was the Denison job, which experts found that Bever could do without posing a safety threat.

Bever's own testimony, which the jury could evaluate, was somewhat contradictory. At one point he said that Kohl, who as we said was the plant manager, told him the Denison job was not permanent. He also stated, however, that he was not told the job was permanent or temporary. He was told to "do the best you can at this job." In response to a question about whether he was told that at some time "you are going to have to be able to do the tire mount and the tire inflation job to keep your job here," he said "No." Then he was asked what he would have done had he been told that. His response was, "I probably would say I have to look for a different job then. I can't stay here no more." Looking at this testimony

as a whole, the jury could have concluded that Bever was not aware that he was being given a temporary job.

The jury could also have concluded that Titan had not shown that the accommodation of allowing Bever to stay at the Denison caused an undue hardship. Didier conceded that Titan never determined whether it would be overly expensive to allow Bever to continue working at the Denison.

Finally, the jury could have inferred that the real reason for Bever's termination was that the company was afraid he was a safety threat at the plant, no matter what job he was doing. Given all this, the jury was entitled to believe that Titan's explanation for Bever's termination was an after-the-fact inspiration designed for litigation. And, after *Reeves*, Bever can prevail by convincing the jury that, in fact, the stated reason for his firing was pretextual. Like this case, *Reeves* involved Rule 50 motions. Although it was an age discrimination case involving a disparate treatment claim, we think it is instructive because, as *Reeves* itself acknowledges, there is a good deal of cross-breeding among various employment laws. The Court found that in a proper situation a prima facie case "combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." 120 S. Ct. at 2109. That is not a novel proposition in our court. *See Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994). The evidence from the medical personnel which the company itself consulted supports the jury's verdict.

Appendix A

Dr. Bruce Griswold, who treated Bever for diabetes since 1989, testified that Bever's diabetes could be controlled and diabetes would not cause him to be a safety threat at the plant. Dr. Drury, who is a medical doctor with a masters degree in public health, testified that in 1995 he performed a physical examination on Bever as the request of the company. He testified at trial that he found a "well-developed well-nourished white male who did not appear to be in any distress. . . ." Furthermore, the examination of Bever's eyes showed that the muscles which control eye movement as well as the backs of the eyes were normal. The latter was important in this case because "people who have long-standing insulin dependent diabetes that is out of control" often have "changes in the backs of their eyes." No changes were found in Bever. After obtaining clearance from Dr. Griswold, Dr. Drury ordered what he described as a "very extensive strenuous" test — a physical capacity assessment. The assessment was performed by David Benavides, a registered occupational therapist. Benavides tested range of motion and strength for the lower extremities, the neck, the trunk, and the upper extremities. He evaluated Bever's walking, sitting, standing, climbing, jogging, and balance, kneeling, squatting, crawling, stopping, lifting, and carrying abilities. He found that Bever's ambulation was adequate on level surfaces, though it was slow, and he had an abnormal gait because of the prosthesis. The conclusion was that Bever could perform his job duties on the Denison. This was a conclusion which Dr. Drury said surprised him after the conversations he had with persons from Titan, who apparently were painting a much grimmer picture. Dr. Drury also testified that it was not reasonable for the company to

believe that the disabilities suffered by a person with an amputated leg, such as Bever, would not be permanent.

All this leads us to conclude that there was sufficient evidence from which the jury could reasonably have concluded that Bever's rights under the ADA were violated.

Titan also raises an alleged evidentiary error in the district court's exclusion from evidence of the EEOC determination of "no evidence to support finding of discrimination." The district judge, John W. Reynolds, found that the determination would likely mislead the jury into thinking that "some governmental agency has done something." Whether or not to allow an EEOC determination to be admitted at trial is within the discretion of the district court. *Reeder-Baker v. Lincoln Nat'l Corp.*, 834 F.2d 1373 (7th Cir. 1987); *Tulloss v. Near North Montessori School, Inc.*, 776 F.2d 150 (7th Cir. 1985). We find no abuse of that discretion.

Also, Titan contends that it is entitled to judgment as a matter of law because Judge Reynolds did not require Bever to explain the inconsistency in his representations to the court and his claim before the Social Security Administration that he was totally disabled. The argument grows out of the recent decision in *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 119 S. Ct. 1597 (1999), in which the Supreme Court held that while an assertion of total disability in a social security claim does not preclude an ADA claim, but

> [w]hen faced with a plaintiff's previous sworn statement asserting "total disability" or the like,

> the court should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in the earlier statement, the plaintiff could nonetheless "perform the essential functions" of her job, with or without "reasonable accommodation."

At 1604. Titan complains that the judge did not require, nor did Bever offer, any explanation, and therefore Titan should have been granted judgment as a matter of law.

The timing on this issue is interesting. *Cleveland* was decided on May 24, 1999. This case was tried from May 26 to June 2, 1999. In preparation for the trial, on May 13, 1999, Bever filed a motion in limine to bar evidence of disability benefit applications to the Social Security Administration. Titan responded to the motion on May 24, claiming that while statements on social security applications are not conclusive of an ADA claim, they are relevant evidence. This is consistent with Titan's earlier statement in connection with its summary judgment motion:

> Plaintiff next argues his receipt of social security benefits is not dispositive. Once again, Titan agrees and never argued that it was.

Titan made this statement in its brief in support of summary judgment. Then, in a commendable heads-up fashion, the

next day — the day after the decision in *Cleveland* — Titan filed a supplemental response, stating that Bever should be required to explain why the SSI application is not inconsistent with the ADA claim. At trial, there was testimony in front of the jury that Bever was receiving social security benefits, and his wife testified that receiving benefits for a period of time was allowed while a recipient tried to return to work.

But there was no instruction informing the jury that receiving benefits under the SSA was not inconsistent with an ADA claim or that Bever had some explaining to do. In fact, there was no jury instruction whatsoever dealing with social security benefits. More importantly, as far as we can tell from the record before us (we have not received much guidance as to what is in the record on this issue), Titan proposed no jury instruction on the issue and raised no objection to that omission. Nevertheless, Titan's argument on appeal is that the district court erred in not granting judgment as a matter of law or a new trial where the court did not require that Bever explain the possible inconsistency between his ADA claim and his SSI application. The problem with the argument is that our review of Titan's Rule 50 motion in the district court shows that the issue was not raised. We cannot find that there was error in the way this trial was conducted in regard to this issue, and in any case it is doubtful whether any potential error was raised before the district court.

The judgment of the district court is AFFIRMED.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: April 16, 2001

BEFORE:

Honorable RICHARD D. CUDAHY, Circuit Judge

Honorable JOHN L. COFFEY, Circuit Judge

Honorable TERENCE T. EVANS, Circuit Judge

No. 00-1594

DUANE BEVER,

Plaintiff – Appellee,

v.

TITAN WHEEL INTERNATIONAL, INCORPORATED, TITAN WHEEL CORPORATION OF WISCONSIN and DICO, INCORPORATED,

Defendants – Appellants.

Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 97 C 511, John W. Reynolds, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN DATED AND FILED OCTOBER 7, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CASE NUMBER: 97-C-0511

DUANE BEVER,

Plaintiff

v.

TITAN WHEEL INTERNATIONAL INC.
and DICO, INC.,

Defendants.

JUDGMENT IN A CIVIL CASE

THE EFFECTIVE DATE OF THIS JUDGMENT SHALL BE OCTOBER 8, 1999.*

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict. The jury rendered a verdict in plaintiff's favor and awarded him $120,000.00 as compensatory damages.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

Appendix B

IT IS HEREBY ORDERED AND ADJUDGED that plaintiff Duane Bever recover from defendants Titan Wheel International, Inc. and DICO, Inc. as follows:

- $120,000.00 for compensatory damages;
- $96,187.25 for lost back wages, lost pension benefits and prejudgment interest;
- $2,581.93 for incurred medical expenses;
- $95,174.23 for attorney fees; and
- $3,715.36 for litigation expenses.

APPROVED: s/ John W. Reynolds
John W. Reynolds, Judge

DATE: October 7, 1999*

October 7, 1999*
Date

SOFRON B. NEDILSKY
Clerk

s/ [illegible]
(By) Deputy Clerk

APPENDIX C — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DATED AND FILED MARCH 27, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 97-C-511

DUANE BEVER,

Plaintiff,

v.

TITAN WHEEL INTERNATIONAL, INC., and DICO, INC.,

Defendants.

DECISION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Duane Bever ("Bever") alleges that defendants discriminated against him because of his disabilities (which the complaint alleges to be diabetes, cancer, a heart condition, and a prosthetic limb) in violation of the Americans with Disabilities Act ("ADA"). Before the court is defendants' motion for summary judgment, which is granted in part and denied in part. Bever will be allowed to go to trial on his claim that defendants failed to reasonably accommodate his disability.

Appendix C

BACKGROUND

Bever has been a diabetic for fourteen years, and has had occasional insulin reactions since that time; he also had his leg amputated in October 1993 (and later received a prosthetic limb), and had a heart attack, resulting in by-pass surgery, in 1995. For approximately twenty-seven years, Bever worked for defendant Titan Wheel International, Inc. ("Titan"),[1] which is in the business of assembling wheels used by manufacturers of lawn and garden equipment and off-road vehicles. Bever was employed as an "assembler," a job which requires an employee to alternate between two work stations: the denison work station and the tire mount/inflate work station. (Defs.' Dec. 22, 1997 Proposed Findings of Fact ¶¶ 2, 3.)

At the denison work station, wheel rims are made ready for mounting; among other things, components are inserted into the rim, and the rim is inspected for defects. We shall see that Bever can currently perform these functions. At the tire mount/inflate work station, tires are mounted on wheel rims and inflated; the tires are physically moved by the employee, and can weigh as much as sixty pounds. We shall also see that Bever is unable to perform these functions. The physical exertion necessary for the tire mount/inflate work station is significantly greater than at the denison work station.

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1. Neither party's proposed findings of fact mention defendant DICO, Inc. The April 30, 1997 complaint intimates that Titan and DICO were related companies, and that Titan has acquired and operates DICO.

Appendix C

The underlying facts which have led to the present dispute apparently begin in April 1993, when Bever retained an attorney to represent him regarding written warnings Bever had received from Titan, his employer, for failing to properly check the quality of work performed at the tire mount/inflate work station.[2] (Jan. 20, 1998 Algiers Aff. ¶ 2.)

By letter dated April 30, 1993, the attorney wrote a letter to Rick Kohl ("Kohl"), the manager of the warehouse and distribution department and Bever's supervisor, which requested that Bever be placed exclusively at the denison work station. In May 1993, Bever was instructed by Kohl to work exclusively at the denison work station, where Bever continued to work until going on medical leave in July 1993, after being diagnosed with cancer in his left leg. Bever's leg was amputated in October 1993.

Bever returned to work on a part-time basis in August 1994, and worked exclusively at the denison work station. In September 1994, Bever went to full time, exclusively at the denison work station, until October 1995, when he was forced to take leave for heart by-pass surgery. Bever was on medical leave from October 1995, until he was terminated in April 1996.

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2. The parties state that the warnings were received regarding work performed on a wheel mount assembler. The parties do not give a description of the wheel mount assembler, but in view of the action later taken, the court understands that it is part of the tire mount/inflate station.

Appendix C

DISCUSSION

The ADA prohibits both discriminatory discharge and failure to provide reasonable accommodation. The April 30, 1997 complaint alleges that defendants discharged Bever because of his disabilities (diabetes, cancer, a heart condition, and a prosthetic limb), and failed to accommodate his disabilities.[3]

The court must grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, admissions, and affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of asserting the absence of any dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Material facts are those facts which, under the governing substantive law, "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

To avoid summary judgment, however, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Even if some facts are in dispute, entry of summary judgment is in order if the movant either establishes uncontroverted facts entitling it to summary judgment or demonstrates that the non-moving

---

3. Bever states in his summary judgment response brief that "[t]his is not a failure to accommodate case." (Pl.'s Jan. 23, 1998 Br. at 13). The complaint does, however, make allegations regarding failure to accommodate (Apr. 30, 1997 Compl. ¶¶ 1, 21, 25), and both parties discuss the accommodation issue on summary judgment.

party has failed to make a sufficient showing on an essential element of its case with respect to which it will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23.

To determine whether material facts are disputed so as to preclude the entry of summary judgment, the court relies on the parties' proposed findings of fact. *See generally* Local Rule 6.05 (E.D. Wis.). The moving party must submit detailed factual propositions in accordance with Local Rule 6.05(a). The non-moving party must specifically respond to movant's proposed findings; if findings are disputed, evidentiary support for the dispute must be cited. Local Rule 6.05(b)(1). A responding party may also submit additional factual propositions. Local Rule 6.05(b)(2). When there is no objection to proposed findings of fact, the court accepts them as true. Local Rule 6.05(d). This is the stage of the litigation in which parties are required to demonstrate that they have sufficient relevant evidence to offer to allow a fact-finder to apply the law and find in their favor.

Disparate Impact Claim

To receive protection under the ADA, a plaintiff must be a "qualified individual with a disability." *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 563 (7th Cir. 1996). The familiar *McDonnell-Douglas* test may be applied to a disparate treatment claim. *DeLuca v. Winer Indus., Inc.*, 53 F.3d 793, 797 (7th Cir. 1995).

Defendants argue that Bever is not a "qualified individual" because he cannot perform the functions at the tire mount/inflate work station. Bever agrees that he cannot

perform these functions.[4] There also is no disagreement that Bever can perform at the denison work station.

Bever does not dispute that he was employed as an assembler, and that as an assembler, an employee is required to alternate between the two work stations. (Defs.' Proposed Findings of Fact ¶¶ 2-4.) Bever's argument is that as of May 1993, he was permanently, rather than temporarily, assigned to the denison work station, so that he should now be held only to the requirements of the denison work station. In support of his argument, Bever cites to portions of the record which indicate that (1) the work situation (Bever's receipt of warnings regarding his work quality at the tire mount/ inflate work station) which arose in April 1993, was resolved by his being placed at the denison work station (Jan. 13, 1998 Bever Aff. ¶ 3); (2) prior (unspecified time) to the amputation of his leg in October 1993, he worked exclusively at the denison work station (*id.*); (3) from May to summer (presumably until July, when Bever went on medical leave) 1993, a co-employee saw Bever working exclusively at the denison work station (Jan. 21, 1998 Wearing Aff. ¶ 5); and (4) he worked at the denison work station for five years prior to leg problems (no indication whether this was exclusive[5]) (Oct. 29, 1997 Bever Dep. at 22). Bever states that at the time he was working full time exclusively at the denison

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4. On two occasions, different outside occupational health professionals were hired by Titan to evaluate Bever. Both concluded that given his physical condition, he cannot safely work at the tire mount/inflate station.

5. Bever performed at both work stations in 1992. (*See* Feb. 20, 1998 Kohl Aff. ¶ 3.)

work station, from May 1993 to July 1993 (when he went on medical leave after being diagnosed with cancer in his leg), and from August 1994 to October 1995 (when he went on medical leave for by-pass surgery), he was never told that the work was temporary and that he would be expected to perform additional duties. (Bever Aff. ¶ 6.)

The job description for an assembler includes tire mounting and inflation, as well as work at the denison work station. (Dec. 22, 1997 Didier Aff., Ex. D-1; Dec. 22, 1997 Kohl Aff. ¶ 5.) It is not disputed that as an assembler who is not disabled, an employee must alternate between the tire mount/inflate and denison work stations. So the dispute arises regarding what Titan should do when an employee becomes disabled. Defendants explain that Bever's initial assignment to work exclusively at the denison work station was based on concerns for his medical condition (Feb. 20, 1998 Kohl Aff. ¶ 3; *see also id.* ¶ 2, and Ex. A), and that when Bever returned to work after his leg amputation in August 1994, he was temporarily permitted to work at only the denison work station, because it was then unsafe for him to work at the tire mount/inflate station. (But the fact is that Bever also worked exclusively at the denison work station from May to July 1993.) The denison work station was considered light duty work and is used for assignments for employees recovering from medical conditions. It was anticipated that Bever would be able to fully perform all work responsibilities (i.e., including those at the tire mount/inflate work station) in the future (Dec. 22, 1997 Kohl Aff. ¶¶ 8-9), which turned out not to be the case.

Bever's belief that his duties were changed from an assembler — which required him to alternate between the

denison and tire mount/inflate work stations — to work exclusively at the denison work station, without more, is not enough to support an actionable ADA disparate treatment claim. Bever has not shown that he is qualified to perform the assembler job he was hired to do. If an employee cannot perform a job, even if solely because of a disability, there is no ADA claim; discharge for a consequence of disability is not actionable. *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194 (7th Cir. 1997). Bever has failed to carry his burden on summary judgment to establish that his termination as an assembler was in violation of the ADA.

Failure-to-Accommodate Claim

The *McDonnell-Douglas* method does *not* apply to reasonable accommodation claims. *Bultemeyer v. Fort Wayne Community Sch.*, 100 F.3d 1281, 1284 (7th Cir. 1996). For his reasonable accommodation claim, Bever must show that he is disabled; Titan was aware of Bever's disability; and Bever was an otherwise qualified individual to work. *Id.* An employer is not required to create a new position or provide the specific accommodation the employee requests, but only to provide a reasonable accommodation. *McCreary v. Libbey-Owens-Ford Co.*, 132 F.3d 1159, 1164 (7th Cir. 1997).

Bever was allowed to work exclusively at the denison work station for nearly a year and a half; whether this assignment was "temporary" is therefore unclear — a permanent "position" (e.g., sufficient full-time work at the denison work station) may have been available. The defendants cite to *Howell v. Michelin Tire Corp.*, 860

F. Supp. 1488 (M.D. Ala. 1994), for the proposition that a company is not required to create a light duty job. In that case, the plaintiff was allowed light duty work on two occasions, one for a few weeks and one for thirteen weeks, the maximum temporary period allowed by the company for light duty. The court denied the defendant company's motion for summary judgment, finding that there was a genuine dispute as to whether the company reasonably accommodated the plaintiff or could have done so without undue burden. *Howell* appears to support Bever's position, and no controlling authority is cited to defeat Bever's argument that placement at the denison work station would have been an acceptable reasonable accommodation.[6]

Given the parties' submissions at this stage of the proceedings, and under the factual circumstances of this action, the court cannot grant summary judgment to defendants on Bever's failure-to-accommodate claim.

CONCLUSION

Defendant Titan Wheel International, Inc., and DICO, Inc.'s motion for summary judgment is **GRANTED IN PART** with respect to plaintiff Duane Bever's disparate impact claim, and **DENIED IN PART** with respect to plaintiff Duane Bever's failure-to-accommodate claim.

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6. The parties do not sufficiently develop a number of issues regarding the reasonable accommodation claim, e.g., there is a suggestion, undeveloped by the parties, that other jobs Bever could have performed were available, and Titan does not discuss whether allowing Bever to continue at the denison work station would present a hardship.

Appendix C

Plaintiff Duane Bever's disparate impact claim is **DISMISSED**.

The courtroom deputy clerk shall notice a telephonic call to schedule the pretrial conference and trial for plaintiff Duane Bever's failure-to-accommodate claim.

SO ORDERED this 27th day of March, 1998.

s/ John W. Reynolds
John W. Reynolds
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED MAY 21, 2001

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Before

Hon. Richard D. Cudahy, *Circuit Judge*

Hon. John L. Coffey, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

No. 00-1594

DUANE BEVER,

Plaintiff-Appellee,

v.

TITAN WHEEL INTERNATIONAL, INC., DICO INC., and TITAN WHEEL CORPORATION OF WISCONSIN,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Wisconsin.

No. 97-C-0511

John W. Reynolds, Judge.

Appendix D

ORDER

On April 30, 2001, the defendants-appellants filed a petition for rehearing and petition for rehearing en banc. All the judges on the original panel have voted to deny a rehearing, and none of the judges in active service have requested a vote on the petition for rehearing en banc. The petitions for rehearing and rehearing en banc are therefore DENIED.

APPENDIX E — RELEVANT STATUTES

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126 — EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES
SUBCHAPTER I — EMPLOYMENT

42 U.S.C. § 12111(8), (9) and (10)

§ 12111. Definitions

As used in this subchapter:

* * *

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include —

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appro-priate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include —

(i) the nature and cost of the accommodation needed under this chapter;

Appendix E

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

* * *

Appendix E

42 U.S.C. § 12112(a), (b)(1) and (5)(A) and (B)

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes —

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

* * *

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered

entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

* * * *

Supreme Court, U.S.
FILED
SEP 18 200

No. 01-304

In The

Supreme Court of the United States

TITAN INTERNATIONAL, INC., DICO INC., and TITAN WHEEL CORPORATION OF WISCONSIN,

Petitioners,

v.

DUANE BEVER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE QUESTION PRESENTED

Whether the district court and the Seventh Circuit applied the correct rule of law in upholding the jury's factual determinations that Mr. Bever was qualified under the ADA to perform the Denison job, Titan placed Mr. Bever in the Denison job permanently, the job placement did not result in the elimination of essential functions and, Titan's continuation of this accommodation would not have placed an undue burden on the company.

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STATEMENT OF THE CASE

In this case, the jury was asked to determine whether Titan placed the disabled respondent, Mr. Bever, into a temporary assignment or into a permanent position following the amputation of his leg, and whether Titan's termination of Mr. Bever violated the ADA. The jury found that Titan had assigned Mr. Bever to the Denison job permanently, the assignment did not pose an undue hardship on Titan and, that Titan had lied to the jury about its real reason for discharging Mr. Bever. The Seventh Circuit found the district court did not abuse its discretion in denying Titan's Rule 50 motions because the jury's factual determinations were based on the district court's properly stated rule of law.

Mr. Bever worked as a machine operator for Titan for over 27 years. Mr. Bever has a number of medical problems including diabetes, cancer, a heart condition, and a prosthetic limb. After Mr. Bever's left leg was amputated in October 1993, Titan assigned Mr. Bever to operate the Denison machine only. Mr. Bever was no longer required to perform the "tire mount" job. Mr. Kohl, the Plant Manager, never informed Mr. Bever that this assignment was temporary or limited in any way. Mr. Bever remained permanently employed at the Denison job for approximately a year and a half.

On October 12, 1995, Mr. Bever suffered an insulin reaction in the company parking lot while off duty. Titan put Mr. Bever through a series of physical evaluations to determine if he posed a safety threat to himself or his coworkers. Titan ordered a Job Analysis for Mr. Bever that

included a step-by-step task analysis of Mr. Bever performing only the Denison job. Mr. Bever was not asked to perform the tire mount job for evaluation purposes. The Job Analysis report concluded that "[o]verall, Dwayne Bever's current physical ability matches the job requirements for *the denison position.*" (emphasis added) Dr. David L. Drury, M.D., who was hired by Titan to conduct a Physical Capacity Assessment, also testified that no one from Titan ever informed him that Mr. Bever's assignment to the Denison position was temporary. Dr. Drury testified that if he had been so informed, he would never have ordered a Physical Capacity Assessment to be conducted in the first place because it was clear that Mr. Bever could not perform the tire mount job. Dr. Drury testified that after Mr. Bever's leg was amputated Mr. Bever would have *always* been restricted from using the tire mount machine because "he does not have two good legs."

Despite evaluations from Titan's three hired experts proving that Mr. Bever could safely operate the Denison, Titan placed him on indefinite "lay-off" on April 1, 1996 due only to "safety concerns". On April 23, 1996, the plant's Human Resources Manager wrote a memorandum to Titan's corporate offices specifically indicating that "[i]n October of 1995, Duane was allowed to return to work full-time, *regular duty with no restrictions.*" (emphasis added) Enclosed with this memo was Mr. Bever's written Job Description identifying that his job was the Denison job. The memo made no mention of Mr. Bever's placement into the Denison job being temporary, or that it comprised only a portion of the job's essential functions.

Titan defended its termination of Mr. Bever before the EEOC on the basis that the *only reason* Mr. Bever was not permitted to return to work on December 21, 1995 was that he "could not ambulate safely in a manufacturing environment without posing a direct safety threat to himself and others." Titan made absolutely no mention to the EEOC of the reason Titan provided at trial – that Mr. Bever's Denison job was temporary and that he needed to be able to perform the tire mount function. Mr. Kohl testified at trial that no one from Titan *ever* explained to Mr. Bever that his employment would be jeopardized if he could not perform the tire mount function. Titan also conceded at trial that *nowhere* in Mr. Bever's employment file, or in the submissions to the EEOC, or in communications to Titan's headquarters, did it state that Mr. Bever had been only "temporarily" assigned to the Denison job.

At trial, Titan gave no explanation as to why its officials gave one reason for the discharge to the EEOC and another to the jury. The Seventh Circuit applied the correct rule of law to uphold the jury's determination that Titan's proffered explanation was an "after-the-fact inspiration designed for litigation." (Pt. Ap. 10a) Titan's petition advances this fraud in an effort to create a legal issue where one does not exist.

SUMMARY OF THE ARGUMENT

Titan argues that a writ is necessary in order to maintain "fundamental fairness". (Pt. 8 FN2) It is not fair, Titan argues, that the Seventh Circuit, in an unpublished

decision, declined to reverse the jury's factual findings that Mr. Bever's Denison job was permanent, did not pose an undue hardship on Titan and, that Titan had lied to the jury about its real reason for discharging Mr. Bever. These are the precise factual issues that the parties and the district court had delineated for the jury. Titan concedes that a rational jury could have found in favor of Mr. Bever on all of them. Titan says it nonetheless seeks "clarification" as to what it should do with its disabled employees in order to avoid "punishment" in the future. In response, the jury, the trial court, and the Seventh Circuit, have instructed Titan to comply with the ADA by simply engaging in frank discussions with its disabled employees about the nature of the accommodation being offered to them.

Titan also says that it seeks a writ in order to resolve a "split among the 1st, 6th and 11th circuits". The cases relied on by Titan from these three circuits are three fact-specific determinations emphasizing the need to evaluate, on a case-by-case basis, whether job reassignment or restructuring would reasonably accommodate the disabled employee, without the elimination of essential job functions. There exists no "split" because the district court and the Seventh Circuit applied the exact same legal standards as those applied by the 1st, 6th and 11th circuits. Titan's petition for a writ cannot be granted when the asserted error consists of only the district court's misapplication of a properly stated rule of law.

REASONS FOR DENYING THE WRIT

I. Writ of Certiorari Cannot Be Granted When the Error Asserted is Only the *Misapplication of a Properly Stated Rule of Law*

This petition for a writ cannot be granted when Titan's asserted error consists only of the misapplication of a properly stated rule of law. *S. Ct. Rule 10.* The Seventh Circuit's review would have been more searching if the district court had committed an error of law, or a finding of fact that is predicated on a misunderstanding of the governing rule of law. *Bose Corp. v. Consumers Union,* 466 U.S. 485, 501, 104 S. Ct. 1949, 1960, 80 L.Ed.2d 502 (1984). If the Seventh Circuit believed that the district court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the district court to make those findings. If it was of the view that the findings of the district court did not create issues for trial within the meaning of Rule 56, it could have set them aside on that basis. If after a review of the trial evidence as a whole, there were exceptional circumstances showing a clear abuse of discretion, it could have entered judgment as a matter of law and granted a new trial. If it believed that the district court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the district court's judgment. *Belknap, Inc. v. Hale,* 463 U.S. 8, 77 L.Ed.2d 798 (1983). Here, the district judge properly understood and expressed the current legal standards for a finding of disability discrimination. The district court's ruling that Mr. Bever's failure to accommodate claim would go to trial, is not inconsistent with established case law.

A. The District Court Applied the Same Correct Legal Standards as Those Applied by The First, Sixth and Eleventh Circuits

The district court set forth the applicable legal standard on Mr. Bever's termination claim, as follows: "[I]f an employee cannot perform a job, even if solely because of a disability, there is no ADA claim; discharge for a consequence of disability is not actionable." (Pt. Ap. C 25a, *citing Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194 (7th Cir. 1997)) The district court further described the proper legal standard by finding that, "Bever's belief that his duties were changed from an assembler – which required him to alternate between the denison and the tire mount/inflate work stations – to work exclusively at the denison work station, *without more* is not enough to support an actionable ADA disparate treatment claim." (Pt. Ap. C. 24a-25a *emphasis added*) The district court also ruled that under the correct legal standard, "[a]n employer is not required to create a new position or provide the specific accommodation the employee requests, but only to provide a reasonable accommodation." (Pt. Ap. C 25a, *citing McCreary v. Libby-Owens-Ford Co.*, 132 F.3d 1159, 1164 (7th Cir. 1997)) The district court allowed Mr. Bever's accommodation claim to proceed because an issue of fact existed as to whether Mr. Bever's placement into the Denison position was temporary or permanent.

The First Circuit case, *Phelps v. Optima Health, Inc.*, 251 F.3d 21 (1st Cir. 2001), cited by Titan as a divergence from authority, applied the precise legal standard our district court had used: "[W]e agree with the Seventh Circuit that evidence that accommodations were made so

that an employee could avoid a particular task 'merely shows the job could be restructured, not that [the function] was non-essential.' " *Id.* at 26, *citing Basith v. Cook County*, 241 F.3d 919, 930 (7th Cir. 2001) (delivery of medicine remained essential function of job despite special assignment allowing employee not to deliver medicine for period of time).

The Sixth Circuit decision cited by Titan, *Bratten v. SSI Services, Inc.*, 185 F.3d 625 (6th Cir. 1999), does not represent a split of authority because the *Bratten* court used the same standard set forth by the district court below. The *Bratten* court specifically found as a matter of law that "employers are not required to assign existing employees or hire new employees to perform certain functions or duties of a disabled employee's job which the employee cannot perform by virtue of his disability." *Id.* at 633-634, *citing Cochrum v. Old Ben Coal Co.*, 102 F.3d 908, 913 (7th Cir. 1996) (having a helper perform "most if not all" of roof bolter tasks were "extraordinary," not reasonable accommodations).

The essential job function standard applied by the district court in Mr. Bever's case was also the same as that set forth in *Holbrook v. City of Alpharetta, Georgia, et al.*, 112 F.3d 1522 (11th Cir. 1997), as follows:

> Federal regulations promulgated pursuant to the ADA expressly note that [a]n employer or other covered entity may restructure a job by reallocating or redistributing non-essential, marginal job functions. . . . An employer or other covered entity is not required to reallocate essential functions. The essential functions are by definition those that the individual who

> holds the job would have to perform, with or without accommodation, in order to be considered qualified for the position.

Id. at 1527-28 *citing* 29 C.F.R. Part 1630, Appendix at 344

Because all three decisions relied on by Titan used the same legal standard as the district court did below, a "split of authority" does not exist. A district court's misapplication of a correctly stated rule of law in its dismissal of Mr. Bever's termination claim, would not be a proper subject of a petition for writ. (*S. Ct. Rule 10* "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.")

B. The Seventh Circuit Applied the Same Correct Legal Standards As Those Applied by the First, Sixth and Eleventh Circuits

Titan's next claim is that the Seventh Circuit's order is faulty because "it holds that, where an employee asserts he did not understand his work assignment was temporary, he can, contrary to the ADA's terms, claim that he was a qualified individual with a disability who could perform the functions of his assignment rather than his 'employment position'." (Pt. Br. 3) The Seventh Circuit actually held as follows:

> Because Bever was allowed to work exclusively at the Denison work station for nearly a year and a half and there were no meaningful discussions between Titan and Bever about the nature of the accommodation, we think that whether the assignment was temporary or permanent was unclear to him, and he can claim he was a

> qualified individual for the job he held. . . . Two separate work place assessments started with the presumption that the job they were evaluating Bever for was the Denison job. In addition, a number of internal company memos allow the inference that the Denison job became Bever's work assignment. . . . Another company official informed the Equal Employment Opportunity Commission that the company 'put Mr. Bever in the Denison position . . . which is the lightest and easiest job we have in the entire plant.'

(Pt. Ap. 6a, 9a, 10a)

Both the district court and the Seventh Circuit relied not only on Mr. Bever's perception that his job was permanent, but also on the duration he was working in the job, Titan's classification of Mr. Bever's job in its own documents, Titan's representations to the EEOC that Mr. Bever's job was the Denison, the failure by Titan to interact with Mr. Bever regarding the nature of the accommodation and, Titan's failure to determine whether it would be overly expensive to allow Mr. Bever to continue the Denison position. The Seventh Circuit measured these factual findings against the standard set forth in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097 (2000), for proper review of a Rule 50 motion. (Pt. Ap. A. 4a-5a) The decisions in *Phelps, Bratten* and *Holbrook* applied the same legal analysis to the particular facts of each respective case, as that used by the Seventh Circuit below.[1]

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[1] *Phelps v. Optima Health, Inc., supra* 251 F.3d 21, 25, 27-28 (1st Cir. 2001) (Essential job functions are determined from the employee's perception of her job, the employer's job

The Seventh Circuit then proceeded to the issue of determining the scope of Titan's duty to accommodate Mr. Bever through job reassignment and/or restructuring. The Seventh Circuit applied the proper legal standard set forth in *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 697 (7th Cir. 1998), as follows:

> *Hendricks-Robinson* involved the precise issue before us: whether light-duty jobs were temporary. We said that if the jobs were truly temporary, the company was not required 'to convert them into permanent ones for permanently

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description, the change in job duties without knowledge or approval of Human Resources, no permanent job-sharing arrangement and the employee's failure to cooperate with the required interactive process); *Bratten v. SSI Services, Inc., supra* 185 F.3d 625, 634-635 (6th Cir. 1999) (No duty to reassign when employee did not apply for posted positions as required by the collective bargaining agreement, the job descriptions showed that all of the positions identified for reassignment required the same physical skills as the original job employee was not qualified to perform, and the employee's expert did not demonstrate that employee was otherwise qualified for the other positions to which he sought re-assignment.); *Holbrook v. City of Alpharetta, Georgia, et al., supra* 112 F.3d 1522, 1528 (11th Cir. 1997), ("It is critical to note that our conclusion is mediated by the facts presented in this case. Our decision is informed by several specific factors, including the unique nature of police work, the particular realities of a small police department in which each of three detectives is expected to be able to respond to any situation, and the types of accommodations proposed by Holbrook. We do not imply that an employer invariably is absolved from having to make reasonable accommodations for a disabled employee whenever a given job involves any measure of unpredictability, nor do we suggest that police departments in general cannot be held strictly to the standards set forth in the ADA.")

> restricted employees.' However, the company has not made it clear whether the jobs were temporary or permanent: '[I]t remains a question of fact whether the jobs were temporary.' At 697. In that case, as well, there was a question of fact 'whether the injured employees knew that the jobs in which they initially were placed were truly temporary or whether they could consider the jobs a reasonable accommodation for their impairments.' At 698.

(Pt. Ap. A 8a)

The fact-intensive inquiry as to whether the assignment was permanent or temporary is a standard that is applied universally by all circuits that have examined the issue. *Bratten v. SSI Services, Inc., supra* 185 F.3d 625, 633-634 (6th Cir. 1999).

Finally, the Seventh Circuit analyzed Mr. Bever's pretext issue pursuant to this Court's standard set forth in *Reeves,* as follows:

> [A]fter *Reeves,* Bever can prevail by convincing the jury that, in fact the stated reason for his firing was pretexual. . . . The [Reeves] Court found that in a proper situation a prima facie case 'combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.' 120 S. Ct. at 2109

(Pt. Ap. A 10a)

In the present case, Titan gave no explanation as to why its officials repeatedly gave one reason for the discharge to the EEOC and another to the jury. Because

Titan's own documents, created through careful collaboration between its senior managers, leave no doubt that Mr. Bever was terminated solely because he was erroneously perceived to be a "safety threat", the Seventh Circuit reasonably accepted the jury's determination that the expiration of Mr. Bever's job was an "after-the-fact inspiration triggered by the necessity of fending off this litigation." *Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13, 21 (7th Cir. 1987).

If the Seventh Circuit believed that the district court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the district court's judgment. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714, 106 S. Ct. 1527 (1986). It is not the function of this Court to now review the Seventh Circuit's unpublished order that declines to reverse the district court's order based on correctly stated and unpublished legal standards. *S. Ct. Rule 10.*

II. Titan's Petition Relies on Overruled Case Law and Ignores Express Language of ADA

Titan claims that Mr. Bever does not meet the definition of "qualified individual with a disability" because he could not perform the essential functions of his *existing* job in the assembly department regardless of the level of accommodation offered. Titan maintains that "[t]he express language of the ADA, as well as decisions of this Court . . . " support its argument. (Pt. 9) In this argument, Titan is in error, and the error is easy to identify.

A. Titan's Petition is Based on Overruled Law

The first pitfall Titan encounters is its reliance on *School Bd. Of Nassau County v. Arline*, 480 U.S. 273, 287 n.17, 107 S. Ct. 1123, 1131 n.17 (1987). (Pt. 10) *Arline*, a Rehabilitation Act case, no longer provides the applicable standard. *Arline* predates the 1992 amendments to the Rehabilitation Act, which substantially changed the standards used in determining whether the Act is violated. *See Shiring v. Runyon*, 90 F.3d 827, 831-32 (3rd Cir. 1996) (stating that under *Arline* employers were not required to reassign disabled employees, but that after the 1992 amendments reassignment is mandatory unless it would cause the agency undue hardship).

B. Titan's Petition Ignores Express Language of ADA

The second fatal infirmity of Titan's analysis is that its reading of the Act ignores the last two words of the statutory definition of "qualified individual with a disability," the last two words being "or desires." 42 U.S.C. § 12111(8). Although a "qualified individual with a disability" has to be someone who can perform the essential functions of *a job*, that inquiry is not limited to the employee's existing job. Rather, the plain language of the statute includes an employee who has the ability to do other jobs within the company that such disabled employee "desires." 42 U.S.C. § 12111(8). To read the ADA otherwise, would render the word "desires" meaningless, and the Court must avoid such a construction. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 574, 115 S. Ct. 1061,

131 L.Ed.2d 1 (1995) ("the Court will avoid a reading which renders some words altogether redundant").

The legal standard applied below, that a "qualified individual with a disability" includes a disabled employee who desires and can perform with or without reasonable accommodation an available reassignment job within the company, though unable to perform his or her existing job, is reinforced by an examination of the ADA's definition of "reasonable accommodation." The ADA definition of "reasonable accommodation" lists the kinds of reasonable accommodations that may be required of an employer. Reasonable accommodations may include, "*job restructuring, . . . reassignment to a vacant position, . . . and other similar accommodations* for individuals with disabilities." 42 U.S.C. § 12111(9) (emphasis added). The term "reassignment to a vacant position" indisputably indicates more than just an alteration to the employee's existing job. A proper reading of "qualified individual with a disability" includes individuals who can perform a reassignment job within the company, with or without reasonable accommodation, even though they cannot perform their existing job no matter how much accommodation is extended. *Every* circuit that has considered the issue supports this interpretation.[2]

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[2] The case Titan cites as divergent from authority, *Bratten v. SSI Services, Inc., supra* 185 F.3d 625, 633-634 (6th Cir. 1999), found that, "every circuit – including this one – to consider the issue has properly held that the ADA requires an employer to consider re-assignment to a vacant position if the disabled employee cannot be reasonably accommodated in his or her current job."

III. Titan's Irrational Fear of "Punishment" and Being Forced to "Discriminate Against Non-Disabled Workers," Despite Safeguards Built Into the Act by Congress, Do Not Make For An *Issue of Recurring National Importance*

Titan harbors the irrational fear that if it accommodates an employee through job restructuring and/or reassignment in the future, it will be "punished" and forced to "discriminate against non-disabled employees". (Pt. 20; Pt. Ap. 5a-6a) As stated by the district court, and the Seventh Circuit, Titan is protected from liability through the safeguards afforded by Congress.

A. Titan's Self Interests Are Protected By Congressional Safeguards

The scope of the employer's obligation to offer an employee reassignment is constrained by Congress's intent as expressed in the Act. First, an employer need not create a new job or modify an essential function of a vacant job. Second, if other employees have a seniority or contractual right to the position, it is not considered vacant for purposes of reassignment. Third, the employer need not make the reassignment nor restructure a job unless the employee is truly qualified to do the new job. Fourth, the employer has the ability to pick and chose which appropriate vacant job will be assigned to the otherwise qualified disabled employee. Fifth, no reassignment is required if it is not a "reasonable" accommodation or if it poses an undue hardship. Congress felt that these were sufficient safeguards. With these protections in place, there is no "recurring and significant issue of

national importance" that remains unchecked. If further limitations are to be sought by Titan, they must come from Congress. *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1170 (10th Cir. 1999); 42 U.S.C. §§ 12112(b)(5)(A), 12111(9).

B. A Writ Cannot Be Sustained Upon Only Titan's Exclusive Motive To Elude Two Unpublished Orders

Titan further claims that "[f]undamental fairness requires that the Seventh Circuit's decision's status as 'unpublished' not mitigate against review by this Court, as there is no less a conflict than if the Seventh Circuit decision at issue here were published." (Pt. 8 FN2) Titan's desire for fairness is not validated by the Rules under the facts of this case.

Contrary to Titan's argument, Circuit Rule 53 provides that "unpublished decisions . . . shall not be cited or used as precedent [ ] in any federal court within the circuit in any written document or in oral argument; or [ ] by any such court for any purpose." *Id.* Circuit Rule 53 further states that "a published opinion will be filed when the decision (i) establishes a new, or changes an existing rule of law; (ii) involves an issue of continuing public interest; (iii) criticizes or questions existing law; (iv) constitutes a significant and non-duplicative contribution to legal literature (A) by a historical review of law, (B) by describing legislative history, or (C) by resolving or creating a conflict in the law . . . ". *Id.* In contrast, when the decision does not satisfy the criteria for publication, it will be filed as an unpublished order. *Id.*

Not only are the decisions below void of any precedential value or legal effect, they do not establish a new, or change an existing rule of law; involve an issue of continuing public interest; criticize or question existing law; contribute to legal literature or resolve or create a conflict in the law. Where the district court and Seventh Circuit orders do not come close to meeting the minimum requirements for publication, it cannot be claimed that they give rise to a "recurring issue of national importance" – especially when the only party negatively affected by the unpublished orders below, was Titan.

CONCLUSION

For the forgoing reasons, the petition for a writ must be **DENIED**.

Dated this 19 day of September, 2001.

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IN THE

Supreme Court of the United States

TITAN INTERNATIONAL, INC., DICO INC., and TITAN WHEEL CORPORATION OF WISCONSIN,

Petitioners,

v.

DUANE BEVER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statements were set forth at page *ii* of their Petition for a Writ of Certiorari, and there are no amendments to those statements.

I. SUMMARY OF REPLY ARGUMENT

The fundamental issue raised by this case is whether a claimant under the Americans with Disabilities Act ("ADA") can be a "qualified individual with a disability" for the purposes of a discrimination claim based on the theory of failure to accommodate while not being a "qualified individual with a disability" for a discrimination claim based on the theory of disparate treatment when both claims arise out of a single adverse employment action, such as termination.

The analysis of an accommodation claim must focus on an "employment position." The rationale suggested by the Seventh Circuit's decision starts with an employee's subjective perception of the permanency of his work assignment. Under such an analysis, any employee can simply claim that he was a "qualified individual" for the set of tasks to which he was voluntarily assigned; thus, the employee may avoid the identification of an employment position. The rationale advanced by the court below was that after some undefined period of time, an assignment, even if such assignment eliminates essential functions, is transformed into a position.[1] The analysis ignores the ADA's requirement that accommodation must be reasonable, and long-established authority holding that accommodations that implicate essential functions are not required by the ADA.

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1. This rationale is certainly a new pronouncement of the law and it renders the words "essential functions of the employment position such individual holds or desires" in 42 U.S.C. § 12111(8) unnecessary for any claimant whose employer voluntarily assigns him to less than all the essential functions of his position. This new rule of law is in conflict with *Phelps v. Optima Health, Inc.*, 251 F.3d 21 (1st Cir. 2001), *Bratten v. SSI Services, Inc.*, 185 F.3d 625 (6th Cir. 1999), and *Holbrook v. City of Alpharetta*, 112 F.3d 1522 (11th Cir. 1997), as well as published opinions within the Seventh Circuit, for example, *Malabarba v. Chicago Tribune Co.*, 149 F.3d 690, 701 (7th Cir. 1998) (rejecting as "unreasonable" plaintiff's argument that employer, who had assigned plaintiff to light-duty tasks, should "separate the automatic lift operator task out of the multi-duty inserting packager position" in order to accommodate plaintiff).

II. CONTRARY TO RESPONDENT'S CONTENTION, THE SEVENTH CIRCUIT DID NOT APPLY THE SAME STANDARDS AS THE COURTS IN THE FIRST, SIXTH AND ELEVENTH CIRCUIT CASES BECAUSE IT APPLIED A TEMPORARY VERSUS PERMANENT ANALYSIS TO MR. BEVER'S *ASSIGNMENT* RATHER THAN TO HIS EMPLOYMENT POSITION

The Seventh Circuit did not utilize a "fact-intensive inquiry as to whether the assignment [to the Denison] was permanent or temporary," as Respondent contends. Opp. 11. Instead, the court completely ignored the ADA requirement that it analyze the "essential functions of the employment position." 42 U.S.C. § 12111(8).

The trial court held that Bever was an assembler, a position that consisted of two essential functions, the tire mount/inflate function and the Denison function. App. 19a. The District Court found, and the Seventh Circuit adopted, the conclusion that Titan's termination of Bever did not violate the ADA because that Bever was not a qualified individual with a disability since he could not perform the essential functions of the assembler position with or without accommodation. App. 25a; App. 2a. A court should not separate an employment position composed of two essential functions into two separate positions, especially when the definition of the employment position is undisputed. Nevertheless, the Seventh Circuit concluded that "we think that whether this assignment was temporary or permanent was unclear to him, and he can claim he was a qualified individual for the job he held," App. 6a, ignoring the prior factual determination that Bever held the assembler position.

To support a failure to accommodate claim, an employee may assert that the position he "holds" can be restructured or that he can be reassigned to a different, vacant position that he "desires." 42 U.S.C. § 12111(9)(b); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1162 (10th Cir. 1999) (collecting cases demonstrating that numerous circuits have interpreted a "qualified individual with a disability" as including individuals "who can perform an appropriate reassignment job within the company, with or without

accommodation, even though they cannot perform their existing job no matter how much accommodation is extended[.]")

The proper analysis of an accommodation claim begins with the identification of the specific position held by the employee and the fact that he desires another position within the company or seeks to restructure his position. The Seventh Circuit decision announced, or at least, suggested, without explanation, a subjective temporal test to determine whether an *assignment* has evolved into a position. This approach, unlike the First, Sixth and Eleventh Circuits' decisions, permits the disabled employee to "hold" two different positions for purposes of discrimination claims under the ADA even though he was terminated from only one.

An employee's assignment to less than all the essential functions of his position is inherently not a reassignment to a position. Since the "job," in this case, was a set of tasks constituting less than all of the essential functions of Respondent's position, Respondent's perception regarding the duration of his assignment changes nothing. He could not perform the essential functions of his position, and no other vacant *position* for which he could perform the essential functions existed. Under these circumstances, as in *Phelps, Bratten* and *Holbrook*, the analysis of the accommodation claim must be co-extensive with the analysis of the termination claim. In short, the claims merge. Under these circumstances, the ADA precludes a claimant from proceeding on a failure to accommodate claim based on a termination from employment where the termination decision itself has been upheld. The rule announced by the Seventh Circuit in an unpublished opinion[2] directly conflicts with the ADA and a dramatic departure from the interpretation in several circuits.

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2. Titan has acknowledged in its Petition that the Seventh Circuit decision is unpublished, which means that under the Seventh Circuit rules it may not be cited or used as precedent. The publication of the decision is not the issue for which Titan seeks review. Nevertheless, the Seventh Circuit's departure from significant authority by embedding legal standards and analysis in an unpublished decision may implicate (Cont'd)

III. THE SEVENTH CIRCUIT'S RATIONALE, IN EFFECT, CREATES A PRESUMPTION OF LIABILITY FOR EMPLOYERS WHO GO BEYOND WHAT THE ADA REQUIRES IN ACCOMMODATING DISABLED EMPLOYEES

The presence of the term "desires" modifying "employment position" in the ADA does not require the courts to analyze an employee's failure to accommodate claim from the employee's perspective of the "new assignment." The question whether an employee is a qualified individual from that perspective would be self-fulfilling because an employer has nothing more to accommodate – the voluntary "assignment" transformed into a desired position will always be one for which the disabled employee is qualified. For accommodation claims, the relevant functions for purposes of analysis are those of the position for which the employee was hired, as opposed to the job to which he is assigned. *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1175-76 (10th Cir. 1999) (affirming district court's analysis of termination claim utilizing essential functions of position for which plaintiff was hired, not the "position" to which she was assigned at time of termination). Unless an ADA claimant is transferred from the *position* for which he was hired to a new *position,* that individual must "hold" the position for which he was hired; moreover, he may only "desire" another existing, vacant position. *See Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (*en banc*); 42 U.S.C. § 12111(9).

The Seventh Circuit's use of a duration standard to transform a "job" into a "position" fails to provide any guidance on the question of whether and when discontinuing a voluntary assignment is

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(Cont'd)
constitutional concerns which are the subject of conflict between the federal circuits. *Compare Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated on other grounds*, 235 F.3d 1054 (8th Cir. 2000) (*en banc*), and *Hart v. Massanari*, __ F.3d __, 2001 WL 1111647 (9th Cir. 2001). In any event, the issue in this matter remains of significant import to employers governed by the ADA.

discriminatory. The Seventh Circuit's rationale fails to define how long an employer may assign an employee to less than all the essential functions of his position without risking the creation of a new position. In contrast, even where the assignment duration exceeds that involved here, other federal circuits that have considered this issue have uniformly upheld an employee's decision to cease such an assignment, because it exceeds the requirements of the ADA. *See, e.g., Holbrook.*

In every case where an employer voluntarily assigns a disabled employee to a set of tasks constituting less than all the essential functions of his employment position, the employer risks exposure to liability, such as that experienced by Petitioner in this case. If the disabled employee suffers an adverse employment action, the employee may claim that he was qualified for the "position" consisting solely of the tasks to which he had been assigned. In effect, this rationale creates a presumption that the employer has violated the ADA even where the ADA would not require the voluntary assignment in the first place. Paradoxically, employers face greater exposure to ADA liability where they do more than the Act requires.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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